In The
Supreme Court of the United States

No. 124

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EDWARD LEON WILLIAMS,
Petitioner,

VERSUS

THE STATE OF OKLAHOMA,
Respondent.

On Writ of Certiorari to the Criminal Court of Appeals of the State of Oklahoma

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

The preparation of a brief in this case has not been easy. In the first place, the contentions of petitioner, while presented in such manner as to give them a semblance of plausibility, are so basically unsound and lacking in merit that decisions based upon the same or similar states of fact are not available. In the second place, the petition-

er's contentions, though presented under several subheads in the brief, are so interwoven that any attempt to separately consider them can only result in repetition.

Petitioner's principal claim is that of double jeopardy. On page 7 of the brief, counsel states:

> "Petitioner has been placed in double jeopardy for his life and subjected to double punishment for the same offense. Once petitioner has been convicted of murder, he cannot be prosecuted for the kidnapping of the same victim as a part of the same continuing criminal offense. The doctrine of double jeopardy prevents petitioner from being twice convicted for the same criminal offense."

On page 8 counsel states:

> "All of the facts, circumstances, and intents of the murder and kidnapping cases are so closely connected that they all merge into the ultimate completed crime, and the conviction and sentencing for the ultimate crime necessarily includes the lesser crime, in this case, of kidnapping."

Again, we know of no such decision. While counsel makes the broad statements above quoted he does not appear to rely upon the guaranties of the Fifth Amendment but rather to that kind of "double jeopardy" outlined in the language at the bottom of page 9 from the opinion of this Court in *Palko* v. *Connecticut*, 302 U. S. 319, 328, 82 L. Ed. 288, 293. But the Oklahoma Constitution contains the same prohibition against former jeopardy as that set forth in Amendment V to the United States Constitution. Section 21 of Article 2 of the Oklahoma Constitution provides in part:

"Nor shall any person be twice put in jeopardy of life or liberty for the same offense."

The statutes in turn provide a manner in which such defense of former jeopardy shall be interposed. Section 513 of Title 22, O. S. 1951, provides:

"There are three kinds of pleas to an indictment of information. A plea of:

"First, Guilty.

"Second, Not Guilty.

"Third, A former judgment of conviction or acquittal of the offense charged, which must be specially pleaded, either with or without the plea of not guilty."

Section 515 provides that the plea shall be entered in substantially the following form:

* * * * * * * * *

"3. If he plead a former conviction or acquittal:

"The defendant pleads that he has already been convicted (or acquitted, as the case may be), of the offense charged in this indictment or information, by the judgment of the court of * * * (naming it), rendered at * * * (naming the place), on the * * * the day of * * *."

This constitutional right to claim former jeopardy must be protected by plea, else it is waived and cannot subsequently be reclaimed.

White v. *State*, 23 Okl. Cr. 198, 214 P. 202;
Ex parte Wood, 21 Okl. Cr. 252, 206 P. 541;
Petitti v. *State*, 3 Okl. Cr. 587, 107 P. 954;
Ex parte Zeligson, 47 Okl. Cr. 45, 287 P. 731;
Mowels v. *State*, 52 Okl. Cr. 193, 11 P. 2d 205;

Fines v. *State*, 32 Okl. Cr. 304, 240 P. 1079;
Collins v. *State*, 70 Okl. Cr. 340, 106 P. 2d 273.

In this case none of the elements requisite for application of the rule relative to former jeopardy exist. The two crimes of kidnapping and murder were entirely distinct and separate crimes, though the murder followed the kidnapping. Counsel has recognized this fact by designating the murder as a "separate crime." The information charging the kidnapping made no reference whatever to the later murder. Instead, the information alleges the kidnapping to have been with the intent "to cause the said Tommy Robert Cooke to be secretly confined and imprisoned at a point in Tulsa County, State of Oklahoma, unknown to this affiant, and against the will of the said Tommy Robert Cooke, for the purpose of extorting a thing of value and an advantage from the said Tommy Robert Cooke." It appeared that the petitioner had robbed his victim of money and an automobile. A separate charge of robbery was filed and the defendant plead guilty and received a sentence of 50 years for such crime. It has not even been suggested that such punishment was a bar to or should act in mitigation of the punishment imposed for the crime of kidnapping. Equally unsound is the claim that the kidnapping "merged" in the crime of murder.

As already stated, we have found no decisions involving an identical state of facts. However, the decisions supporting our position in principle are so numerous that we hesitate to engage in any extensive review of them.

Section 192 of the U. S. Penal Code declares it to be a crime for any person to forcibly break into or attempt to break into any postoffice, with intent to commit in such postoffice any larceny or other depredation. Section 190 makes it a crime to steal, purloin or embezzle any mail bag or other property in use or belonging to the postoffice department, or to appropriate any such property to one's own use or for any other purpose than its proper use. In the case of *Morgan* v. *Devine*, 237 U. S. 632, 59 L. Ed. 1153, the contention was made that a conviction for a violation of Section 192, *supra*, would constitute a bar to a conviction for a violation of Section 190, where such larceny followed the burglarous entry. This Court, however held to the contrary and said in part:

> "We think it is manifest that Congress, in the enactment of these sections, intended to describe separate and distinct offenses, for in §190 it is made an offense to steal any mail bag or other property belonging to the Postoffice Department, irrespective of whether it was necessary, in order to reach the property, to forcibly break and enter into a postoffice building. The offense denounced by that section is complete when the property is stolen, if it belonged to the Postofflce Department, however the larceny be attempted. Section 192 makes it an offense to forcibly break into or attempt to break into a postoffice, with intent to commit in such postoffice a larceny or other depredation. This offense is compete when the postoffice is forcibly broken into, with intent to steal or commit other depredation. It describes an offense distinct and apart from the larceny or embezzlement which is defined and made punishable under § 190. If the forcible entry into the postoffice has been ac-

complished with the intent to commit the offenses as described, or any one of them, the crime is complete, although the intent to steal or commit depredation in the postoffice building may have been frustrated or abandoned without accomplishment. And so, under § 190, if the property is in fact stolen, it is immaterial how the postoffice was entered, whether by force or as a matter of right, or whether the building was entered at all. It being within the competency of Congress to say what shall be offenses against the law, we think the purpose was manifest in these sections to create two offenses. Notwithstanding there is a difference in the adjudicated cases upon this subject, we think the better doctrine recognizes that, although the transaction may be in a sense continuous, the offenses are separate, and each complete in itself."

In *People* v. *Simpson*, 66 Cal. App. 2d 319, 152 P. 2d 339, the court said in part:

"The further contention is made that appellant could not be convicted of the crime of robbery and also the crime of kidnapping for the purpose of robbery. Neither crime is necessarily included in the other. Each has elements of criminal action in addition to those which go to make up the other and, although they were committed in the course of a continuous series of acts, a conviction of both is not forbidden by constitutional immunity from double jeopardy. *People* v. *McIlvain*, 1942, 55 Cal. App. 2d 322, 130 P. 2d 131; *People* v. *Bruno*, 1934, 140 Cal. App. 460, 35 P. 2d 391."

In *People* v. *Cluchey* (Cal.), 298 P. 2d 633, the court said in part:

"Kidnaping for the purpose of robbery is a separate and distinct offense from the robbery. *People* v. *Beltran*, 93 Cal. App. 2d 704, 706, 209 P. 2d 635. Here there was a clear case of kidnaping for the pur-

pose of robbery. Defendant forced Spencer at gunpoint to drive around for several blocks until a convenient place for robbing him was found, where he ordered him to stop and the robbery took place. There were two separate and distinct offenses committed—the transportation or kidnaping for the obvious purpose of robbery and the robbery at the place where Spencer was ordered to stop. The judgment sentencing defendant for the two offenses did not constitute double punishment for one offense. Cf. *People* v. *Brown*, 29 Cal. 2d 555, 176 P. 2d 929."

In *Gilmore* v. *United States*, 124 F. 2d 537, the Circuit Court of Appeals for the Tenth Circuit said in part:

"Coming to the merits, it is contended that after appellant had been indicted, tried and found guilty in the former case of the crime of robbery of a national bank, he could not be prosecuted in this case under a separate indictment charging the killing of the officer in attempting to free himself and his associates from confinement; and that the trial, conviction and sentence in this case constitute double punishment for a single offense. The Fifth Amendment to the Constitution of the United States guarantees against double jeopardy for a single offense. But that guaranty is no impediment to the power of Congress to make separately punishable each step leading to the consummation of a transaction which lies within the reach of Congress to prohibit. *Albrecht* v. *United States*, 273 U. S. 1, 47 S. Ct. 250, 71 L. Ed. 505; *Reger* v. *Hudspeth*, 10 Cir., 103 L. Ed. 825, certiorari denied 308 U. S. 549, 60 S. Ct. 79, 84 L. Ed. 462. Two or more offenses may be separate and distinct in law despite the fact that they grow out of the same transaction, if each embraces one or more elements different from the others. *Slade* v. *United States*, 10 Cir., 85 F. 2d 786. And the test to be applied in determining the question of identity of offenses charged in two or more counts of a single indictment or in

separate indictments is whether each necessitates proof of fact not required of the others. *Blockburger* v. *United States*, 284 U. S. 299, 52 S. Ct. 180, 76 L. Ed. 306; *Mills* v. *Aderhold*, 10 Cir., 110 F. 2d 765; *Hunt* v. *Hudspeth*, 10 Cir., 111 F. 2d 42; *Carpenter* v. *Hudspeth*, 10 Cir., 112 F. 2d 126, certiorari denied 311 U. S. 682, 61 S. Ct. 62, 85 L. Ed. 440; *Caballero* v. *Hudspeth*, 10 Cir., 114 F. 2d 545."

In *Burns* v. *State*, 72 Okl. Cr. 432, 117 P. 2d 155, the contention was made that the conspiracy merged in the commission of the crimes which were the object and purpose of the conspiracy. The court held the contrary. In the first and second paragraphs of the syllabus the court said:

"1. The crime of conspiracy does not merge in the felonies described as overt acts in the indictment, where the conspiracy is a crime and not an essential part of the felonies to accomplish which the conspiracy was formed.

"2. A conspiracy to commit a felony constitutes an independent crime, complete in itself and distinct from the felony contemplated."

In the body of the opinion the court said in part:

"The general rule which has been adopted in the states which have had occasion to discuss this question, and the one which we think is in accordance with sound public policy and which will promote the ends of justice and be conducive to the efficient enforcement of the criminal law, is as stated in the case of *People* v. *Tavormina*, 257 N. Y. 84, 177 N. E. 317, A. L. R. 1405, in which it is stated:

"'The crime of conspiracy does not merge in the felonies described as overt acts in the indictment, where the conspiracy is a crime and

not an essential part of the felonies to accomplish which it was entered into.

"'A conspiracy to commit a felony constitutes an independent crime, complete in itself and distinct from the felony contemplated.

"'The fact that indictment for conspiracy alleges overt acts constituting a felony, or that the evidence discloses that the conspiracy was executed by the commission of a felony, does not render the indictment demurrable or prevent a conviction for conspiracy.'

"There is a lengthy annotation at the conclusion of this case in which authorities are cited from many jurisdictions sustaining this view. 75 A.L.R., *supra*."

In 15 Am. Jur., Criminal Law, § 390, page 65, the general rule is stated as follows:

"A putting in jeopardy for one act is no bar to a prosecution for a separate and distinct act merely because they are so closely connected in point of time that it is impossible to separate the evidence relating to them on the trial for the one of them first had. Consequently, a plea of former jeopardy will not be sustained where it appears that in one transaction two distinct crimes were committed."

In 31 Am. Jur., Kidnapping, § 19, page 359, the general rule with reference to kidnapping cases is stated as follows:

"The question of double jeopardy has been raised in jurisdictions where the separate offense of kidnapping may be committed although the purpose of the taking and detention is to commit another offense. The general principle stated elsewhere in the work is that prosecutions for separate offenses based upon the same transaction do not involve double jeopardy

where there are distinct elements in one offense which are not included in the other. Accordingly, the rule is that a prosecution for one of the separate offenses of rape and kidnapping or robbery and kidnapping based upon the same event is not barred by the prior prosecution for the other offense under the doctrine of double jeopardy which forbids a person from being twice put in jeopardy of life or liberty for the same offense."

In *Collins* v. *State*, 70 Okl. Cr. 340, 106 P. 2d 273, the court held that "a putting in jeopardy for one offense is no bar to a prosecution for a separate and distinct act merely because the two offenses are so closely connected that it is impossible to separate the evidence relating to them on the trial for the one of them first had."

In *Fall* v. *United States*, 49 F. 2d 506, the Court held that an acquittal on a charge of conspiracy to defraud the United States would not constitute *res judicata* in subsequent prosecution for bribery based on substantially the same facts.

In *Poffenbarger* v. *Aderhold*, 67 F. 2d 250, the court held that a conviction for stealing mail bags did not preclude a later conviction for taking mail from the bags.

The term "double punishment" is coupled in petitioner's brief with that of "double jeopardy." In the case of *Donato* v. *United States*, 48 F. 2d 142, the Circuit Court of Appeals for the Third Circuit said in part:

"The appellant argues that he gave a bond at the time of the final decree entered in the padlock proceedings for the express purpose of settling the punish-

ment which would be imposed on him in the event that he should violate the terms of the decree; and consequently the contempt proceedings were an attempt to subject him to double jeopardy. This contention is unsound; for the reason that the facts in this case do not constitute double jeopardy as defined by the cases. The constitutional prohibition is not against double punishment, but against being 'twice put in jeopardy,' double trial. *Bens* v. *United States*, 266 F. 152, 159 (C. C. A. 2); *United States* v. *One Buick Coach Automobile* (D. C.), 34 F. 2d 318, 321; *United States* v. *Ball*, 163 U. S. 662, 669, 16 S. Ct. 1192, 41 L. Ed. 300."

It is further contended that the petitioner was denied due process in that the trial court admitted "improper statements" in aggravation of the punishment. In connection with this statement counsel contends that the Oklahoma Criminal Court of Appeals misconstrued certain State statutes. This certainly was a matter for the Criminal Court of Appeals to settle and does not concern this Court. Moreover, it appears from the transcript (pages 23 to 29) that at the discussion with the petitioner and with counsel on both sides, the court inquired of petitioner as to whether or not the statements which had been made by the county attorney were correct and in response the petitioner confirmed all of such statements as true and further stated that he did not have anything further to say on his behalf, and even here counsel does not contend or suggest that the statements to which he objects were other than true statements of the facts involved.

It is further contended that (page 39 of the brief):

"Due process has been denied in that the punishment assessed against petitioner is wholly unreasonable and disproportionate to the kidnapping in this case."

This contention is hardly worth discussing. The matter is one for decision by the Oklahoma courts and many cases can be cited in which such a penalty has been imposed. Such penalty may be imposed under the statutes of Oklahoma in cases of rape, robbery and kidnapping, as well as murder.

In California the legislature amended their statute on kidnapping so as to provide for the death penalty in case the person kidnapped suffered bodily harm. In *People* v. *Tanner et al.* (Cal.), 44 P. 2d 324, defendants were charged with kidnapping and robbery by means of deadly weapons. They were convicted and sentenced to death. The sentences were affirmed on appeal. It did not appear that anyone was killed in connection with the commission of the crime.

In *People* v. *Brown* (Cal.), 176 P. 2d 929, defendant was convicted of robbery on two counts of rape and of kidnapping for purpose of robbery and a death sentence was imposed. The conviction was affirmed. The court said in part:

"Section 209 as amended in 1933 provides:

"'Every person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away

any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or robbery or to exact from relatives or friends of such person any money or valuable thing, or who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by imprisonment in the State prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnaping suffers or suffer bodily harm or shall be punished by imprisonment in the State prison for life with possibility of parole in cases where such person or persons do not suffer bodily harm.'

"This section makes it unnecessary to determine whether the kidnaper intended to commit extortion or robbery at the time of the original seizure or carrying-away. It is sufficient if the extortion or robbery was committed during the course of the abduction. Thus, whatever may have been the original motive of the kidnaping, if the kidnaper commits extortion or robbery during the kidnaping, he 'holds or detains' his victim 'to commit extortion or robbery' within the meaning of section 209."

If the contention of counsel were sound, then the second offense statutes of Oklahoma and the other states should be held unconstitutional and yet they have been sustained. Under such statutes, the defendant is not prosecuted subsequently because of the prior conviction, but such conviction is taken into consideration in fixing the punishment for the subsequent offense.

It is further interesting to note that the Federal Statute relating to kidnapping authorizes the imposition of the death penalty in cases of bodily harm, even though

no one has been killed. Yet this statute has been upheld by this Court.

Gooch v. *United States*, 297 U. S. 124, 80 L. Ed. 528;

Robinson v. *United States*, 324 U. S. 282, 89 L. Ed. 944.

Respectfully submitted,

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JANUARY, 1959.

Thereafter, in answer to a question from the Chief Justice, Mr. Goldberg continued:

> "* * * The State question left open concerns the notice of election. These districts cannot enter into contracts of this sort with the United States without having a vote on their elections. And the notices of election were attacked as being defective and the California court says we will not pass on this attack on the notices of election because we are going to reverse the case. They are going to have to go back to new contracts anyhow, and it is not necessary for us to determine that question. If this Court in turn reverses that opinion, it will be necessary for the California Court to determine the problem of election."[2]

The Court's treatment of the matter. The Court's opinion (p. 22)[3] discusses the claimed reasonableness of omitting from the contracts any statement of the capital component chargeable to the districts. It likewise considers (pp. 20-21) the highly controversial proposition that lands, taxed but denied delivery of water from the project, will indirectly benefit therefrom. In the latter connection, the Court evidently overlooked the express finding of the trial court, in No. 124, that there is "no evidence" to support a finding that the Albonicos' lands in excess of 320 acres "would be benefited by the operations of the Madera Irrigation District" In the light of this finding, the trial court, as stated above, ordered as one alternative that such lands be excluded from the District. (R. 412; Appellees' brief, p. 79.) In any event, the Court's opinion does not appear to discuss

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2. The quoted passages are from pages 29, 30 of the Transcript of Oral Argument, jointly arranged for by appellants and appellees. Subsequently, Mr. Rockwell, for appellees, pointed out, page 96, that in all four cases there were state questions left unanswered.

3. All citations of the Court's opinion are paged to the pamphlet print.

these matters in the context of state law and makes no reference to Section 23223 or any other provision of California law.

However, the opinion at one point declares (p. 3):

> "On the merits, we deem the contracts controlled by federal law and valid as against the objections made."

Moreover, the opinion concludes with the notation that the judgments below are *"Reversed"*, and contains no statement that the cases are remanded to the Supreme Court of California for decision of the remaining state issues. This is contrary to the practice of this Court in, for example, *Standard Oil Co. v. Johnson*, 316 U.S. 481, 485, and *San Diego Unions v. Garmon*, 353 U.S. 26, 29.

In the absence of any further indication from this Court as to its intentions, appellees will have no recourse other than to request the Supreme Court of California to proceed to determine whether the election notices in Nos. 122, 123 and 125 were valid under Section 23223 of the State Water Code; to decide whether, if the Madera contract is valid, the lands of the Albonicos in excess of 320 acres should not be excluded from that District; and to resolve other questions of state law. It would appear, however, that the Court's intention in this regard should be clarified by it, in accordance with the orderly administration of justice and in fairness both to appellees and the California courts. See *Federal Trade Commission v. Carter Products*, 346 U.S. 327, wherein the court of appeals was required to amend its judgment setting aside an order of the Commission so as specifically to authorize the taking of further evidence and a new order by that agency.

We submit that rehearing should be granted on this point in order that the Court may reconsider the extent to which state law governs these proceedings. In any event, the deci-